ZENDA GOLD CORPORATION

IBLA 99-358 Decided May 16, 2001

An appeal from a Record of Decision issued by the Field Manager, Bishop (California) Field Office, Bureau of Land Management, denying a mining plan of operations within a wilderness study area because the proposed mining activities were not "grandfathered." CACA 38993.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Wilderness

   A Wilderness Study Area is subject to the protection of section 603(c) of FLPMA, which authorizes "grandfathered use" exceptions to the non-impairment standard. In order to qualify under the "grandfathered use" exception, the use in question must have been in existence on Oct. 21, 1976, and must have continued thereafter following the logical pace and progression of development.

APPEARANCES: Richard K. Thompson, Esq., Reno, Nevada, for Zenda Gold Corporation; John R. Payne, Esq., and David Nawi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for Bureau of Land Management; Johanna H. Wald, Esq., Natural Resources Defense Council, San Francisco, California, for Natural Resources Defense Council, Friends of the Inyo, The Wilderness Society, and California Wilderness Coalition; and William E. Wright, President, People for the USA, Bishop Chapter, Big Pine, California.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Zenda Gold Corporation (Zenda/appellant) has appealed a Record of Decision issued May 13, 1999, by the Field Manager, Bishop (California) Field Office, Bureau of Land Management (BLM), disapproving mining plan of operations CACA 38993, submitted by Paramount Gold, Inc. (Paramount), for mining activities on mining claims located in secs. 24 and 25, T. 5 N., R. 26 E., Mount Diablo Meridian (Mono County, California). 1/ The Field

1/ Paramount proposed activities involve in part the following mining claims located in 1956 and 1959: Red Spot #1-#5, CAMC 13522 through CAMC 13526, and Summit #2, #1, CAMC 44998 and CAMC 44999. Other claims owned by

Manager concluded that the proposed mining operations to be conducted on lands within the Bodie Wilderness Study Area (WSA) are not "grandfathered uses" within the scope of section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1994). 2/

On October 31, 1997, Paramount, a wholly-owned subsidiary of Zenda, submitted the subject Plan of Operations, proposing to do exploratory drilling to evaluate and further define the extent of a mineralized deposit. The plan was subsequently expanded on November 5, 1998. BLM prepared environmental assessment (EA) No. CA-170-99-19 to review Paramount's proposed action, as well as an alternative which, BLM reported, would meet non-impairment criteria, and a no-action alternative.

Paramount proposed a two-phase operation. Phase 1 consists of (1) collecting surface soil samples using pick axe and shovel; (2) drilling 12 holes with a track drill rig--three would be drilled adjacent to existing vehicle routes, seven would be drilled adjacent to reclaimed routes, and two would be drilled in previously undisturbed areas; (3) constructing 450 feet of new 12-foot wide roads, reopening 200 feet of reclaimed roads to access drill sites, and traveling cross-country over 1,200 feet; and (4) constructing 12 drill pads and 12 deep drill cutting and water containment pits. The estimated area of disturbance would be 0.42 acres and the proposed activities would last approximately 4 weeks. (EA at 3.) If favorable mineral intercepts are found during Phase 1, Paramount would commence its Phase 2 drilling program. Under the Phase 2 proposal, Paramount would pursue a program more rigorous than Phase 1, to include: (1) drilling 22 holes with a track drill rig--9 of those holes adjoining existing vehicles routes, 8 holes adjoining reclaimed routes, and 5 holes in previously undisturbed areas; (2) constructing 550 feet of new 12-foot wide roads to drill sites, reopening 2,550 feet of reclaimed roads, and traveling cross-country over 450 feet; and (3) constructing 22 drill pads and 22 deep drill cutting and water containment pits. The estimated area of disturbance would be 1.29 acres. (EA at 3-4.) Under the proposed plan for both phases 33,000 square feet of reclaimed roads would be reestablished/rebladed and 12,000 square feet of new roads would be constructed. (EA at 6.) In addition, blading activities for pits and drill pads would encompass just less than 29,400 square feet. (EA at 6.)

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fn. 1 (continued)
Paramount within the proposed area of operations include: Lee #25, #27-#30, #32-#40, and #51-#57, CAMC 79731, CAMC 76989 through CAMC 76992, CAMC 76994 through CAMC 77001, and CAMC 77013 through CAMC 77019 (located in 1980 and 1981).

2/ Mining operations are defined as "all functions, work, facilities, and activities in connection with the prospecting, development, extraction, and processing of mineral deposits and all uses reasonably incident thereto including the construction and maintenance of means of access to and across lands subject to these regulations, whether the operations take place on or off the claim." 43 C.F.R. § 3802.0-5(f).

Paramount proposed using the Geiger Grade Road, described as a light duty gravel road maintained by the county, for transportation of drilling equipment, supplies, and personnel to the general exploration area. "A cherrystemmed road traverses the WSA from Geiger Grade Road for about a mile; thereafter, the remaining portion is along a well established two-track route before taking secondary two-track and rehabilitated routes to the drill sites themselves." 3/ (EA at 4.)

A "Non-Impairment Alternative," as set forth in the EA, would consist of only those mining activities that complied with non-impairment criteria. Under this alternative, drilling operations would be strictly confined to the area's existing routes and in barren areas where no reclamation would be required. However, no drill pad construction, mud containment pit development, or road construction would be permitted. (EA at 6.) Under the "No Action Alternative," the present situation would be maintained and no mining activities or related support operations would be permitted in the WSA. (EA at 6.)

In reviewing the proposed activities, BLM commented with respect to "affected resources" that

> [e]xploration, drill site preparation and route construction activities had occurred around the Paramount Mine area and at the South Hill site before and after the area was designated a WSA in 1979. In some cases, pre-FLPMA two-track routes were used for exploration activities. After WSA designation, any subsequent exploration impacts were rehabilitated according to IMP [Interim Management Policy and Guidelines for Lands Under Wilderness Review] and 43 C.F.R. § 3802 guidance to restore any affected wilderness values. These routes and drill pads were closed to vehicle use and revegetated. Although some of these pre-FLPMA two-track routes have been rehabilitated, they may continue to be used for mining exploration activities as long as they are not degraded beyond the routes' physical condition that existed prior to FLPMA.

(EA at 7.) Such pre-FLPMA conditions and activities were the focus of a BLM report added to the EA as Appendix A. Therein, BLM discussed "grandfathered" uses as delineated in section 603 of FLPMA, supra, 43 C.F.R. Subpart 3802, and BLM's WSA management policies addressed in BLM's IMP. 4/ In addressing "grandfathered uses," the report advised that "[a]ccording to 43 C.F.R. 3802 and under the Bureau's IMP, the mining

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3/ A cherrystemmed road is a road that enters a WSA but was excluded from the WSA when it was designated. (EA at 4.)

4/ The IMP was originally published at 44 Fed. Reg. 72014 (Dec. 12, 1979), later amended at 48 Fed. Reg. 31854 (July 12, 1983), and then incorporated in a Handbook (H ! 8550 ! 1 (Rel. 8 ! 36 (Nov. 10, 1987))) as part of BLM's Manual. The current Handbook is H ! 8550 ! 1 (Rel. 8 ! 67 (July 5, 1995)) (citations in the text are to the Handbook page).

operations occurring on these claims which created surface impacts at the time of FLPMA (Oct. 21, 1976) could qualify." (EA, Appendix A at 1.) The report also explained that, because it is the use which is grandfathered and not the mining claim, operations may continue in the same manner and degree as on October 21, 1976, "so long as the impacts of the extension are not of a significantly different kind than the impacts existing on October 21, 1976." (EA, Appendix A at 1.) Such operations, the report summarized, may proceed by a logical pace and progression, to include geographical extensions or insignificant changes in the type of activity. (EA, Appendix A at 1, emphasis supplied.) The report then presented a history of mining on these claims and detailed the activities from 1959 through 1998. Finally, it provided rationale to both support and deny asserted grandfathered uses. The report concluded that there is logic to some mining activities being "grandfathered" as Paramount's proposal continues, for the most part, in "the same manner and degree." (EA, Appendix A at 11.) However, the report continued, a lack of sequential mining development and an extended lapse of "logical pace and progression" work against application of grandfathered uses here. (EA, Appendix A at 12-13.)

In its May 13, 1999, decision, BLM denied approval of the proposed plan because implementation would impair the suitability of the Bodie WSA, the proposed activities did not satisfy the "grandfathered" criteria, and there was no evidence of a pre-FLPMA "discovery." 5/ (Decision at 1.) BLM explained that road construction and drill pad construction were the specific activities that would impair the area's wilderness suitability and that, even after implementation of mitigation measures, those activities could still result in soil disturbance and vegetation loss on 1.58 acres. (Decision at 1.) The view within the WSA of those new disturbances, BLM held, would no longer meet the wilderness requirement that areas under consideration be natural appearing. (Decision at 1.) In particular, BLM relied on the Board's decision in Southern Utah Wilderness Alliance, (SUWA) 125 IBLA 175, 100 I.D. 15 (1993), reporting that the Board concluded "all

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fn. 4 (continued)

As to management of WSA's pending a determination of suitability for inclusion in the permanent wilderness system, this Board has consistently found the guidelines established by the IMP to be binding on BLM. See Nevada Outdoor Recreation Association, 136 IBLA 340, 342 (1996); Oregon Natural Resources Council, 114 IBLA 163, 167 (1990); The Wilderness Society, 106 IBLA 46, 55 (1988). BLM may not depart from the IMP without express justification, and that justification must be shown in the record.

5/ BLM also requested evidence of a pre-FLPMA "discovery" if Paramount wished to assert a "valid existing right" which, according to BLM, would exempt the mining claims from the wilderness non-impairment criteria and could result in subsequent approval of the plan of operations. While BLM noted that the lack of evidence to support a pre-FLPMA discovery is a reason for not approving a plan of operation, it is clear that the grounds here for rejecting Paramount's plan was a determination that there were no grandfathered uses. Discovery is not at issue in this case; BLM merely requested information regarding that matter.

road construction within a WSA automatically constitutes a violation of the non-impairment standard." (Decision at 1.)

BLM further explained that it applied the non-impairment standard because the proposed activities did not qualify as "grandfathered" uses which would have been exempt. (Decision at 2.) BLM recognized that mining activities similar to those set out in the proposed plan were occurring on October 21, 1976, and that the evaluation of geological structures would indicate that the proposal was a logical progression of those activities. However, it concluded that the proposed activity did not qualify as a grandfathered use because there was more than a 6-year hiatus in on-the-ground exploration or mining activities and thus the plan failed to meet the criteria for "continuation of existing uses" and "logical pace." (Decision at 2.) BLM stated that it had found that a 1- to 4-year lapse in physical activity was the usual industry standard with a typical length of inactivity being 2 years. BLM found there had been no regulatory hurdles, access problems or other unique circumstances that would have prevented claimant Paramount from continuing exploration activities. (Decision at 2.) Again relying on SUWA, supra, BLM concluded that a 6-year absence of mining activity failed to meet the logical pace and progression criteria and therefore pre-FLPMA uses were no longer grandfathered. (Decision at 2.)

On appeal, Zenda contends in its statement of reasons (SOR) that the activities proposed in the subject plan of operations are "grandfathered uses" and that there was no lapse in development activity which would justify a termination of "grandfathered" rights. It also maintains that BLM's definition of "development" was too narrow and did not comply with BLM's own policy or the standards set by the Board. (SOR at 2.)

Zenda asserts that the general area around the Bodie townsite has been the subject of both surface and underground exploration for over 100 years, that 170 known holes have been drilled in the area and that the Paramount mine itself was mined as recently as 1968. (SOR at 4.) It also notes that BLM recommended to Congress in 1990 that the Bodie WSA be deemed "non-suitable" for wilderness designation. (SOR at 4.) Appellant avers that BLM acknowledged grandfathered status for mineral development plans submitted by Molycorp in 1984, Homestake in 1987, and Equinox in 1991. (SOR at 5.) It also argues that various types of surface activity, which BLM purportedly refuses to acknowledge as "qualifying," have taken place on the property since Noranda last drilled in 1990. (SOR at 6.) Appellant contends that BLM's approach to qualifying uses in this case is unjustifiably narrow, and constitutes an arbitrary limitation contrary to BLM's own internal policy. It cites BLM's own September 16, 1997, letter as indicative of the types of non-drilling activities BLM considers to be qualifying uses. That letter sought information on the following activities which would support grandfathered use: geological mapping, geophysical surveys, field mapping, surveying, assessment affidavits, engineering studies, feasibility studies, economic analysis, time for ownership transfers, legal problems, and any changes in economics affecting the previous engineering or feasibility work. (SOR at 6-7; see Sept. 16, 1997, Bishop Resource Area Manager letter to Paramount at 2-3.) Paramount

contends that all of these specified forms of alternative work, except boundary surveying, was performed on the claims during the 6 year "lapse." (SOR at 9.)

Appellant argues that SUWA is clearly distinguishable from the instant situation inasmuch as the claimants in that case had performed no work for 12+ years and also were asking for an extension into the WSA of uses that had previously been performed outside of the WSA. (SOR at 12.) Appellant asserts it is only requesting permission for a logical continuation of the exploration activity that had been performed before. (SOR at 12.) Finally, appellant maintains that the claimant in SUWA was attempting a completely new type of use whereas the proposal here is for the same activity which was performed in 1984, 1988, 1989, and 1990. (SOR at 13.)

In its answer, BLM maintains that SUWA does indeed apply because of the conclusion there that road construction was not a grandfathered use since the 12-year lapse between road construction activities did not represent a "logical pace and progression of development." (Answer at 4, citing SUWA, 125 IBLA at 187.) BLM argues that the proposed activities here likewise do not represent a "logical pace of development" because the industry employs a standard of 1- to 4-year lapse, with the "typical length of inactivity being two years." (Answer at 5.) BLM contends that its decision was appropriately grounded on the fact that neither road construction nor drilling had occurred for more than 6 years and therefore the proposed activities could not be considered a "logical pace of development" of pre-FLPMA operations. (Answer at 4.) BLM comments that the activities mentioned in its September 16, 1997, letter were not intended to set a standard that would guarantee a finding of grandfathered uses. Rather, it asserts, the request was aimed at gathering information that might support a finding of logical pace and progression. (Answer at 6.)

In response to Zenda's contention that the claims themselves--and therefore the uses thereof--pre-date FLPMA, BLM argues that not all, but only specific and continued activities associated with those pre-existing claims can qualify as grandfathered. (Answer at 5.) BLM maintains that the application of grandfathered status to uses is rendered meaningless without reference to a specific activity which can be shown to have been continued at a logical pace and progression. (Answer at 5.) BLM notes that, while both road construction and drilling were authorized in the 1980's, such activities have not taken place since the summer of 1990. (Answer at 6.) BLM contends the determination that the more than 6-year lapse in drilling and road construction did not constitute a logical pace of development is reasonable and Zenda has offered no evidence to refute that determination. (Answer at 7.)

Intervenors National Resources Defense Council, Friends of the Inyo, The Wilderness Society, and California Wilderness Coalition (Intervenors-Respondents) have also submitted an answer to Zenda's SOR. They favor BLM's guidelines which state that the term "continuation in the same manner and degree" implies that the use proceeds by a "logical pace and progression" from pre-FLPMA existing uses. (Intervenors-Respondents' Answer at 11, citing IMP at 13.) They point out that in SUWA, this Board stated that

nothing in the legislative history of FLPMA lends "even a modicum of support [to the] interpretation that merely because a use happened to exist on the critical date [October 21, 1976,] that the land would be forever subject to that use." (Intervenors-Respondents' Answer at 11, citing SUWA, 125 IBLA at 194.) They maintain that the pre-FLPMA existing uses for these mining claims were all uses associated with active exploration of the site (Intervenors-Respondents' Answer at 11, citing EA at A-3 to A-4), and contend that after 1990 there was no active exploration because there was no on-the-ground, physical activity. (Intervenors-Respondents' Answer at 12, citing SOR, Appendix C.)

Intervenors-Respondents argue that when Paramount obtained the subject claims in December 1994, it was on notice that the extended lapse in mining activity threatened future use because SUWA had been decided in 1993. (Intervenors-Respondents' Answer at 12.) They assert that there was a 3-year period of non-activity before Paramount submitted its proposal to conduct exploration functions as further evidence of no on-going activities. (Intervenors-Respondents Answer at 13.)

In separate replies to BLM's and Intervenors-Respondents' answers, appellant argues that the issue of whether the activities performed by Paramount were in the "same manner and degree" as pre-FLPMA activities was conceded by BLM in a March 1, 1999, letter wherein BLM stated that Paramount had "met the progression standard in the 'same manner and degree' definition." (Appellant Response to BLM at 3; Appellant Response to Intervenors-Respondents at 2.) The issue here, it contends, is whether BLM had reasonably concluded that Paramount's activities had not continued at a logical pace. (Appellant Response to BLM at 3; Appellant Response to Intervenors-Respondents at 2.) Appellant asserts the 6-year figure adopted by BLM field geologists was arbitrary. (Appellant Response to BLM at 4; Appellant Response to Intervenor-Respondent at 2.) Appellant notes that the 3-year period between acquisition of the claims and submission of the plan of operations, apart from those pre-drilling activities previously mentioned, is well within the industry standard mentioned by BLM. (Appellant Response to BLM at 4.) Appellant explains that during the 3-plus years between the last mining activity in 1990 and Paramount's acquisition of the claims its predecessor waited for Congress to act on the WSA designation. This period, appellant argues, was not without mining activity, a plan of operations having been submitted in 1991. (Appellant Response to BLM at 4.) Noting that BLM had reasonably concluded that the "standard time frame between purchasing and confirmation drilling on a property is 2 - 4 years" (Appellant Response to BLM at 4, citing March 1, 1999, BLM Memorandum on Grandfathered Uses at 2), appellant contends that BLM should have allowed up to 12 years for logical progression in this instance to account for the three conveyances of the claims have which have occurred since 1991. (Appellant Response to BLM at 4.)

In response to BLM's answer, Intervenor People for the USA, Bishop Chapter (Intervenor Bishop Chapter), argues that allowing Paramount's Plan of Operations to proceed would not affect the rest of the Bodie WSA because the disturbance would impact less than 2 acres out of the almost 16,500 acres embraced by the WSA. (Intervenor Bishop Chapter Response at 1.) It

argues that BLM cannot reject the plan because the activities in the plan are the same as the identified pre-FLPMA activities. (Intervenor Bishop Chapter Response at 4.) Moreover, Intervenor Bishop Chapter insists that Paramount should not be charged for any lapse in activity that occurred before Paramount acquired the claims, arguing that Paramount proceeded with plans to resume activities within 3 years of acquisition. Noting that a grandfathered use can be acquired by a different owner (Intervenor Bishop Chapter Response at 6, citing IMP at 12), Intervenor Bishop Chapter maintains that Paramount proceeded with deliberate speed and in sincere fashion after acquiring the claims by conducting sampling and an aerial geophysical survey, a high technology activity it urges is analogous to the on-the-ground exploration that prior claimants had pursued. (Intervenor Bishop Chapter Response at 6.)

[1] The Secretary of the Interior is directed by section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1994), to review those roadless areas of 5,000 acres or more identified during the inventory of the public lands as having wilderness characteristics, 6/ and make a recommendation to the President regarding the suitability or nonsuitability of each such area for preservation as wilderness. See Rocky Mountain Oil & Gas Assn. v. Watt, 696 F.2d 734, 745 (10th Cir. 1982); Paul B. Dubose, 137 IBLA 186, 187 (1996). Specific guidance with respect to management of inventoried lands pending completion of the review and action by Congress in response to the recommendations is provided by section 603(c) of FLPMA, which states in pertinent part:

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the

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6/ Sections 103(i) and 603 of FLPMA, 43 U.S.C. §§ 1702(i) and 1782 (1994), incorporate by reference the definition of wilderness characteristics embodied in section 2(c) of the Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1994), set forth as follows:

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable

> public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c) (1994). 7/ Evident in the language of section 603(c) is an exception to the nonimpairment standard allowing for continuation of existing mining uses in the same manner and degree in which they were being conducted on October 21, 1976. See also 43 C.F.R. § 3802.0-6; 3802.1-3; BLM Manual, H-8550-1, at 12. Such "grandfathered uses" are allowed to continue even though they would impair the wilderness suitability of the WSA. Committee for Idaho's High Desert, 139 IBLA 251, 253 (1997); Robert L. Baldwin, 116 IBLA 84, 87 (1990); BLM Manual, H-8550-1, at 12. It is significant that the statute is referring to actual existing uses, as distinguished from statutory rights to use the land, when it authorizes continuation of existing uses in the same manner and degree. State of Utah v. Andrus, 486 F.Supp. 995, 1006 (D. Utah 1979); see 43 C.F.R. § 3802.0-5(j). Thus, the existence of some operation which was actually being conducted on the land on October 21, 1976, is a prerequisite. See Dave Paquin, 129 IBLA 76, 80 (1994); John Loskot, 71 IBLA 165, 167 (1983); Dale F. Gimblett, 60 IBLA 341, 345 (1981).

As noted, the term "grandfathered uses" is defined under the statute by the phrase, "continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976." 43 U.S.C. § 1782(c) (1994); see 3R Minerals, 148 IBLA 229, 231 (1999). The term "manner and degree" means "actual on-the-ground activity taking place on October 21, 1976." See Rocky Mountain Oil & Gas Assn. v. Watt, supra at 749; Murray Perkins, 116 IBLA 288, 294 (1990). Under relevant Departmental regulations, "manner and degree" means that

> existing operations will be defined geographically by the area of active development and the logical adjacent (not necessarily contiguous) continuation of the existing activity, and not necessarily by the boundary of a particular * * * claim or lease, and in some cases a change in the kind of activity if the impacts from the continuation and change of activity are not of a significantly different kind than the existing impacts. However, the significant measure for these activities is still the impact

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fn. 6 (continued)
its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

7/ FLPMA expressly requires the Secretary to protect WSAs during the review process, by creating two distinct duties of conservation: (1) a "nonimpairment" duty--to manage the WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness * * *," and (2) a "nondegredation" duty--to "take any action required to prevent unnecessary or undue degredation of the [WSAs] and their resources * * *." Sierra Club v. Hodel, 848 F.2d 1068, 1085 (10th Cir. 1988).

> they are having on the wilderness potential of an area. It is the actual use of the area, and not the existence of an entitlement for use, which is the controlling factor. In other words, an existing activity, even if impairing, may continue to be expanded in an area or progress to the next stage of development so long as the additional impacts are not significantly different from those caused by the existing activity. In determining the manner and degree of existing operations, a rule of reason will be employed.

43 C.F.R. § 3802.05-(j). BLM's IMP states that continuation in the same manner and degree implies the use may proceed by a "logical pace and progression (either a geographic extension or a change in the type of activity) as long as the impacts of the extension of the new activity are not of a significantly different kind than the impacts existing on October 21, 1976." (BLM Manual, H-8550-1, at 12.)

In determining whether appellant is entitled to take advantage of the grandfathered use exception to the nonimpairment standard, we must first focus on the activities that were actually occurring "on October 21, 1976." Both appellant and BLM have relied on the following detailed history of the subject operation:

DATE	WORK COMPLETED
1959	Original location of mining claims.
August 27, 1964	Repair raise and chute in the drift, timber and lag two sets 200 ft. from portal of tunnel cleaned out portal tunnel.
August 17, 1965	Surface cuts made with cat and dozer.
August 29, 1967	Development of main ore body by removing over-burden above old tunnel and shaft, repair to mine access road.
August 8, 1968	Development of main ore body by removing overburden, sampling stock piling ore and milling approx. 400 tons of ore.
July 29, 1968	Dozer and front end loader stripped 10,000 yards of overburden to expose mineralized zone and vein.
August 8, 1968	Drilled 7 holes & stripping with cat & dozer.
August 26, 1970	Repaired tunnel sets & cleaning out tunnel stripping & open cuts with cat & dozer.
August 31, 1973	Dug holes and trenches with backhoe.
August 27, 1974	Dug holes and trenches with backhoe and sampling.
August 28, 1975	Cleaned out cuts, sampling, geological examination of all claims.
August 30, 1976	Trenched on surface.
August 30, 1977	Road building, dug open cut 10 ft. cleaned up and opened tunnel.
September 1978	Repaired tunnel, sampling and mapping.

June 1979	Cleaning tunnel, extending tunnel and stopping.
August 30, 1979	Cleaning tunnel and road work.
October 1979	Removal of stone and trenching.
August 1980	Cleaning tunnel and road work-Homestake.
July 1981	Homestake road construction and improvements.
1981	Homestake Exploration drilling.
September 1982	Homestake sampling, geologic mapping.
September 1983	Exploration drilling-Homestake.
September 1984	Molycorp Plan of Operations approved to drill.
March 1985	Molycorp IMP notice for proposed drilling.
November 1985	Molycorp completes exploration drilling and reclaims 80% of disturbance.
August 1986	Molycorp completes all reclamation except 1 acre on South Hill that Homestake takes over reclamation responsibility for. Homestake conducts additional drilling.
July 1987	Plan of Operations authorized for 14 drill sites, drill pads, route construction and rehabilitation. "Grandfathered" determination made for Homestake Mining Company mining claims in 1987.
October 1987	Exploration drilling by Homestake.
January 1988	Exploration drilling by Homestake.
August 1988	Plan of Operations approved for continuation of 1987 Homestake drill plan after the property is returned by Molycorp to drill 13 rotary reverse circulation holes.
Sept 1988	Exploration drilling, road building and assay work-Homestake.
October 1988	Homestake and Noranda enter into joint venture and conduct magnetic resonance survey and reclamation reviewed by BLM.
June 1989	Drilling program completed by Noranda and Homestake under Notice of Intent (NOI) for 21 of the 39 holes were drilled.
October 1989	Compliance check on reclamation of 16 holes drilled.
January 1990	Reclamation responsibilities transferred from Homestake to Noranda.
June 1990	Addendum to 1989 NOI with 11 drill sites added to the 1989 NOI.
September 1990	Cleaning out tunnel.
May 1991	Reclamation completed on the 1989 & 1990 NOI drilling projects.
July 30, 1991	Equinox Resources Inc. purchases Homestakes Paramount property, Homestake retains a royalty interest in the property. Equinox Resources Inc. submits a proposal to conduct exploration activities under "grandfathered" use rights. Drilling intended to follow-up

on best intercepts from Noranda and Homestake programs.

August 1991	Geophysical surveying for Homestake.
September 1991	Geophysical survey conducted.
October 1991	BLM prepares environmental assessment and approves Equinox's drilling proposal based on "grandfathered" use rights.
October 1992	Equinox confirms completion of prospecting, sampling and mapping of Paramount extension targets.
December 1992	Deferment of assessment work granted.
1993/1994	Equinox pays rental fee for the Lee, Red Spot, Summit, Atastra Creek and Dry Lake Claims in lieu of assessment as required by new mining law.
October 5, 1993	Equinox filed "Notice of Intention to Hold Mining Claims" for claims in Wilderness Study area, pursuant to the provision of 43 C.F.R. 3833 and FLPMA.
November 1993	Equinox Resources Inc. is taken over by Hecla Mining Co. conditional to a due diligence period which was completed by March 1994.
December 6, 1994	Hecla divests assets including Paramount property, which is bought by Paramount Gold Inc. (wholly owned subsidiary of Zenda Gold Corp.)
1995	Geophysics program involving overflight of property conducted to follow upon surface anomalies discovered in earlier exploration programs. Paramount raises seed capital from investors based on favorable review of data.
August 1996	Paramount Gold Inc. completes initial round of financing and becomes a publicly traded company with a listing on the Canadian Dealer Network. Paramount Gold Inc. is approached by a major gold exploration company regarding the establishment of a joint venture to explore Paramount extension targets located between the Paramount property holdings and its Bald Peak prospect claims held. A Surface sampling confirms surface mineralization with grab samples as high as 1 ounce per ton.
October 31, 1997	Paramount Gold Inc. proposes to continue past exploration operations inside WSA CA-010-100 near Paramount Mine. BLM begins preparation of environmental assessment, and distributes IMP notice to interested publics.
March 13, 1998	The proposed Plan of Operations was put on hold until resource surveys could be completed. It was determined that a new plan

would be provided to include two phases of exploration proposed by Paramount Gold Inc.

November 5, 1998 Paramount Gold Inc. submits expanded Plan of Operations.

(SOR, Appendix C; EA, Appendix A at 4-6.)

An individual seeking to avail himself of the exception must affirmatively establish that the work to be performed constitutes a grandfathered use within the meaning of section 603(c) of FLPMA. Richard C. Behnke, 122 IBLA 131, 136 (1993). As to the adequacy of the evidence appellant has presented regarding the activities being conducted on October 21, 1976, BLM has acknowledged:

> Claimants have provided proof of labor and assessment work documentation to indicate what uses were being conducted on or before October 21, 1976. The claimants' documents provided information on activities and impacts that were occurring on or before October 21, 1976 in order to substantiate a grandfathered determination. The BLM considered these uses "grandfathered" in 1987 and 1991 when the claimants requested additional drilling authorization. * * * Specifically, the activities were associated with the following uses:
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> 1. Backhoe trenching and prospect pit excavation;
> 2. Underground mining and sampling;
> 3. Road building;
> 4. Drilling;
> 5. Mapping, sampling, and tunnel work.

(EA, Appendix A at 3.) As shown, BLM has unequivocally determined by approving plans of operations in 1987 and 1991 encompassing the subject claims that certain pre-FLPMA uses were grandfathered.

Referring to the history of activities, it shows that in 1987 then-claimant Homestake submitted a plan for 14 drill/pad sites and related route construction. As noted, the plan's approval was based on BLM's determination that grandfathered uses existed. The record does not reflect that any drilling occurred between 1969 and 1981, or that any drilling was being conducted in October 1976. During 1987, 1988, and 1989, Homestake and Noranda built roads and drilled several holes. However, their operation was discontinued and reclamation was completed in 1990 and 1991. While that is the last recorded drilling on these claims, geophysical exploration, mapping, sampling, and other mine development activities continued. In 1991, Homestake and Noranda sought and secured release of Performance Bond No. 5606904, security for what became the Paramount project. BLM has described activity on the claims thereafter as follows:

> In 1991, Equinox Resources Inc. submitted a proposal to continue exploration activities under the "grandfathered" uses concept. Although the Bureau determined the proposal qualified as "grandfathered" uses and Equinox was authorized to proceed

with exploration subject to mitigation measures to prevent unnecessary or undue degradation of public lands, no work was performed by the claimants.

* * * * * *

Hecla Mining entered into a purchase and sale agreement with Equinox in mid 1992 and closed the transaction in early 1993. Hecla acquired Equinox's claims because Hecla was more technologically advanced and large resources and take it into production quickly.

* * * Hecla sold the claims in December 1994 to Paramount Gold Inc.

* * * * * *

Based on the potential of favorable mineralization, Paramount acquired the claims to follow up on the Homestake, Union Molycorp, and Noranda drilling programs with a drill program modeled after Equinox's plan of operations submitted in 1991. Paramount retained the services of a geologist who was responsible for portions of the 1989 and 1990 Noranda drill programs. Because of his experience and knowledge of the previous drill programs, he provided additional data to Paramount to design their current proposal. This information was important to follow up and extend on the earlier work completed.

After the purchase, the company began the process of data compilation and data review to refine its ideas for future drilling in the area. It referred to more than 170 drill logs and associated reports generated by Homestake, Union Molycorp and Noranda. This process was a time consuming and difficult process as the data was spread over four companies in different locations. Additionally, a flood had damaged some of the data to such an extent that it was sent to a firm specializing in the reconstruction of fire and water damaged documents.

Following a comprehensive data review, compilation of drill data, cross sections, several site visits, etc., Paramount submitted a Plan of Operations to conduct exploration drilling * * *.

(EA, Appendix A at 3, 7-8.)

There is no mistake as to the facts of this case. During the 6-year period from May 1991 through October 1997, as from 1969-1981, none of the intermittent drilling activities which had occurred on the claims from 1981 through September 1990 were being conducted, but many of the same activities that were being conducted from 1969 through 1981 (and on October 21, 1976), and at all times thereafter, were being conducted. These included the equally significant activities of sampling, geophysical exploration,

assaying, geological mapping, claims review and proposal of plans of operations. Paramount therefore requested in 1997 to pursue a modest drilling program, an activity already grandfathered under two prior plans of operations.

In rejecting the 1997 application, BLM determined that there was a lapse in the logical pace and progression of the grandfathered uses, making the exception unavailable to the applicant. We conclude that BLM's determination is contrary to the record.

The central issue before us then is whether the "grandfathered use" exception acknowledged in 1987 and again in 1991 by BLM for these claims has terminated due to lack of development during the 6-year period in question. Of the arguments presented, there are two in particular requiring closer scrutiny. Appellant asserts that geophysical exploration, mapping, sampling, assaying, development of plans of operations, and the other non-drilling development work performed during the period in question perpetuate the grandfathered status. We agree. The regulations specifically contemplate this process, and the IMP states that continuation in the same manner and degree implies the use may proceed by a "logical pace and progression (either a geographic extension or a change in the type of activity) as long as the impacts of the extension of the new activity are not of a significantly different kind than the impacts existing on October 21, 1976." BLM Manual, H-8550-1, at 12. The history provided by BLM in the record states that the only 1976 activity on the claims which could have been used by BLM to support grandfathered requests for drilling in 1987 and 1991, similar to that now requested by appellant, included the August 30, 1976, activity of trenching on the surface. The sole listed activity immediately prior to October 21, 1976, included work on August 28, 1975, described as: "Cleaned out cuts, sampling, geological examination of all claims." No drilling or road building is listed in BLM's chronology (which appellant and the Board accept) in the 24 months prior to October 21, 1976. This clearly reflects that the geophysical exploration, sampling and the analysis of present data and prior drilling cores, coupled with administrative efforts to secure the right to drill that appellant and its predecessor engaged in during the six years in question, are activities more similar to those taking place on October 21, 1976, than the stated activities of drilling and roadbuilding against which BLM now seeks to hold appellant accountable.

Moreover, in a letter from the Bishop Resource Area Manager to Paramount's president on September 16, 1997, the Area Manager further defined what activities he required evidence of to establish a grandfathered use for appellant's claims. The Area Manager stated:

> In order to verify grandfathered uses, it is important that work progressed on developing the mineral deposit in a logical pace. I must verify, for the record information supporting reasonable diligence in developing this deposit in order to support your claim to grandfathered uses under the manner and degree standard of section 603(c) of the FLPMA.

Some examples of the type of information that support a claim of grandfathered use include:

> a. Any physical activity which supports mineral deposit definition or feasibility (i.e., geological mapping, geophysical surveys, field mapping, or surveying).
>
> b. Assessment affidavits that describe completed assessment work for the claims.
>
> c. Any engineering, feasibility studies, economic analysis associated with the development of the mineral deposit.
>
> d. Time for ownership transfers, legal problems that would affect the ability to enter the property to complete development of the mineral deposit.
>
> e. Change in economics affecting the previous engineering or feasibility work requiring a change in such work, including the time necessary to complete these changes.

(Bishop Resource Area Manager letter to Mark Bailey, Paramount Gold Inc. dated Sept. 16, 1997, at 2-3.) These are precisely the activities undertaken by appellant during the 1991-1997 period, as established by BLM's chronology.

We also note that the record indicates BLM's Bishop Field Office Geologist conceded in a memorandum to the Bishop Field Manager dated March 1, 1999, that Paramount "met the progression standard in the 'same manner and degree' definition." See Bishop Field Office Geologist Memorandum to Bishop Resource Area Manager dated March 1, 1999, at 1. BLM thus appears to contend only that the required pace of development is lacking. But BLM's geologist Richard Deery, when asked by the BLM's Bishop Field Office Geologist to advise on the "pace" issue related to the Paramount claims, observes:

> Interestingly, once the property gets handed off to a small scale Junior with no apparent production, the pace picks up. Airborne geophysics in 1995 and surface sampling in 1996 and a proposal to BLM for drilling in 1997. Once again, compared to the 9 quiescent years from 1978 to 1987 or 11 quiescent years from FLPMA to 1987, things are moving at light speed. From 1987's grandfathered decision to our 1991 grandfathered decision (with apparent logical pace and progression) its four years. From the time that Zenda gets the property in 1995 and asks us to drill. Its slightly more than a year and a half. Pace? Progression? You bet!

See November 16, 1998 Memorandum from BLM Geologist Richard Deery to Cheryl Seath, Bishop Resource Area Geologist at 4. This statement is consistent with BLM's own IMP Case Summary concerning the appellant's proposed action provided to the public on October 31, 1997. In the Chronology of Events section, the Bishop Resource Area Manager states:

> 1991-1997 Claimant continues development of the mineral deposit in a logical pace and progression according to the mining law.

(Bishop Resource Area IMP Case Study, October 31, 1997, at 4.)

Our careful review of the pace and progression issues, independent of the similar determinations made by members of the Bishop Field Office staff, convince us that appellant met the requirements for a reasonable and logical pace and progression set forth in the IMP.

We note that the Department's regulations specifically provide that "[i]t is the actual use of the area, and not the existence of an entitlement for use, which is the controlling factor." 43 C.F.R. § 3802.0-5(j). The uses existing on October 21, 1976, are exempted from the non-impairment standard, and those same uses involving the active exploration for ore did not lapse between 1991 and 1997. Based on the record before us and the various descriptions of the purported "mining activities" involving the subject mining claims, we find that the grandfathered uses identified by BLM in 1988 and 1991 were performed on the claims after 1991.

We next turn our attention to the basis for BLM asserting a lapse in use, the Board's decision in SUWA, supra. The majority opinion in that case held that "since the road-building activities which are sought to be extended into the WSA have failed to evince the 'logical pace and progression of development' as required by the IMP, they may not be allowed, in the absence of a showing that they are necessary to the exercise of a valid existing right." SUWA, 125 IBLA at 190. That holding was based on a conclusion that "the 12-year hiatus between road construction activities simply fails to evince the prerequisite 'logical pace and progression of development' necessary to validate an asserted 'grandfathered use'." SUWA, 125 IBLA at 187. We find the SUWA decision to be inapposite to our current issues, however. There is no road building or drilling in the chronology of the Paramount claims from 1969 through 1981, yet the drilling requests in 1984 and 1988 were grandfathered.

The statute and regulations clearly articulate the intent to provide for continuation and expansion of any use existing on the date of passage of FLPMA. The statute does not clarify whether such a pre-FLPMA use may expire nor does it require that there be continuous and uninterrupted development. No penalty is stipulated in the event a claimant fails to undertake a use for any period of time. The majority opinion in SUWA appropriately illuminated those issues as follows:

> Thus, the critical phase of the proviso states "subject to the continuation of existing mining and grazing uses and mineral

> leasing in the manner and degree in which the same was being conducted on the date of approval of the Act." * * * The congressional utilization of the phrase "continuation of existing" uses shows that it was not only the existence of the use which gave rise to grandfathered rights but also the continuation of that use in the same manner and degree that was protected. And, it is on this concept that the IMP's "logical pace and progression of development" standard is premised.

SUWA, 125 IBLA at 194. The majority concluded that the legislative history "clearly recognizes that uses can be terminated so long as that action is not arbitrary." SUWA 125 IBLA at 193.

Neither the majority opinion nor the dissenting opinions in SUWA provide magical insight into determining when a grandfathered use has ceased. The only thing the majority determined was that for that particular set of facts, a 12-year hiatus in activities ongoing on October 21, 1976, was too long.

Carefully applying the parameters to grandfathered uses set forth by both the majority and dissenting opinions in SUWA, we find that BLM's application of its IMP requires that it carefully review any grandfathered uses proposed to be conducted within a WSA, determine whether a logical course of development has occurred as shown by those proposing such activity, and scrutinize whether such development has been continuous and in good faith. Such a review includes a determination whether a period of inactivity constitutes a break in the logical course of development tantamount to a ruling that the use has not been continuous as statutorily required. The only guidance provided is found in 43 C.F.R. § 3802.0-5(j): "[A] rule of reason will be employed."

BLM, in the instant situation, has concluded that a 6-year period of inactivity in drilling is not reasonable based upon an industry standard. Conversely, we find persuasive evidence that activities which BLM itself finds adequate to satisfy the "activity" requirement for satisfactory pace, set forth by the Resource Area Manager himself in his September 16, 1997, letter, occurred throughout the 6-year period.

Appellant points out, and the record reflects, that an industry standard of up to 4 years may be required after acquisition for a new operator to initiate development. That industry rule of thumb was more than met by appellant here. As stated in the IMP, supra, we must apply a rule of reason.

We find that appellant has made such a showing inasmuch as operations embracing the grandfathered uses, as defined by the Resource Area Manager, had continued throughout the 6-year period including the 3-years after Paramount's acquisition of the mining property at issue. We therefore reverse BLM's determination to deny any grandfathered uses and direct further consideration of appellant's mining plan of operations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed. The record is remanded to BLM for further consideration of the plan of operations consistent with the grandfathered uses established which warrant an exception to the non-impairment standard.

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James P. Terry
Administrative Judge

I concur:

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James F. Roberts
Administrative Judge